had so agreed, and where suit was begun within two years after a final accounting was struck, is the claim time-barred under the two-year limitation of the Suits in Admiralty Act?

2. Section 709(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1199(a) requires that charters of Government vessels include a provision for sharing of "cumulative net voyage profits". Does the "cumulative" provision prohibit a charterer from offsetting profits by losses in subsequent years or does it call for one cumulation—sharing—over the period of the charter as already held in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, certiorari denied by this Court three years ago, 372 U.S. 944?

COUNTER-STATEMENT

The facts are set forth in the opinion of the court below (Petition App. 1a-9a). The facts appear to be undisputed, and no restatement would be necessary, were it not for the following omissions from Petitioner's Statement:

1. The effect of the decision below does not appear in the Statement. Under the charter here, the Maritime Commission was entitled to two types of hire from Black Diamond: a) basic fixed charter hire plus b) a half-share of "cumulative net voyage profits" over 10 per centum per annum on capital employed.

Total cumulative profits were $667,908.72—but the Maritime Commission demanded and received $943,050.41 as "preliminary payments" of its "share." Since "preliminary payments" for the Government's "share" of profits were more than *total* profits, Black Diamond is left with a net loss of $275,141.69, without any allowance for a return on capital or otherwise. This fact the Court below recognized, holding that the

Government "has been unjustly enriched" (Pet. App. 15a). The amount Black Diamond claims in this suit—$247,315.67—will not even make it whole, and will still leave the Government with more than 100% of all profits (Pet. App. 8a-9a).[1]

2. Petitioner's Statement refers (Pet. p. 6), to a 1951 document "labeled a 'final accounting'" submitted by Black Diamond, after earlier mentioning "considerable correspondence" about this accounting (Pet. p. 5). The "considerable correspondence" is not described, but it should be. The correspondence reveals, as the opinion below shows in detail (Pet. App. pp. 4a-8a), that the parties agreed the 1951 accounts were not and could not be final; as Black Diamond advised the Commission: "it must be evident that these accountings cannot be 'final'" (letter of November 28, 1950, Pet. App. 5a).

3. Petitioner's Statement refers (Pet. p. 6, footnote 5) to additional items representing "roughly one per cent of the total cash transactions" recorded between the 1951 accounting and the 1955 accounting held to be the final accounting by the Court below. The amounts of the additional items, as found by the Court below, were "not inconsiderable": expenditures of $199,535 and receipts of $257,843 (Pet. App. p. 10a).

4. Petitioner's Statement asserts (Pet. p. 8, footnote 8) that "The accounting process has not yet ended; there are still items recorded on Black Diamond's books which have not been accounted for or audited." As a matter of fact if there are *any* items not audited, the fault is plainly the Government's. All items but one set

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[1] The reason Black Diamond cannot be made completely whole is that the charter was split into two accounting periods by the "Foreign Trade Addendum": *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 250-51.

involving a collision claim settlement were presented in the 1955 accounts. As a matter of fact the Government *has* audited the 1955 accountings (though refusing for tactical reasons to issue formal advice of audit). The Government has known of the only subsequent item—the collision claim settlement—throughout the litigation below.

5. The Court below found as a fact that the correspondence between the parties "conclusively" implied "that the account was not ripe to be squared off" in 1951 (Pet. App. p. 10a). The Court below found as a fact "that no final audit was attempted or practicable before 1955." (Pet. App. p. 9a).

6. The Court below found as a fact that the delays in settling accounts did not injure the United States which long has been in possession of the money (Pet. App. p. 15a).[2]

ARGUMENT

1. No aspect of this case calls for exercise of the certiorari jurisdiction.

The decision below is plainly right as a matter of individual justice; the effect of the decision is to allow Black Diamond to recover back a part of its payments—supposed to be *sharing* of profits—so that the Government does not retain too much more than 100% of profits as its "share" of profits. It is as if a taxpayer were seeking to pay 110% of its income as tax, not 150%. The Court below said, and it was plainly right, that to deny the claim would be to leave the Government unjustly enriched (Pet. App. p. 15a). No considerations of policy or equity call for altering a decision so as to produce an unjust result.

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[2] Interest (at 4 percent) would run on the claim only from date of suit: Suits in Admiralty Act, Sec. 5, 46 U.S.C. 745.

Much of the decision below is concerned with the individual facts, and the decision itself turns on critical findings of fact as to the meaning of the correspondence between the parties, the state of accounts, and so on. The decision below is of no general importance; it has value as a precedent only to future litigants—if any—who both (a) have contracts with similar provisions for "final audit" and (b) can show correspondence and journal entries proving when the parties agreed accounts were "ripe to be squared off" and when final audit was "attempted or practicable" (Pet. App. pp. 9a, 10a). In legal context, such a holding is of little future importance, and in practice, of little immediate significance. The Petition seeks to lend importance to this case in three ways: (A) by claiming that two or three million dollars worth of claims in other cases turn on the holding here (Pet., p. 11); (B) by asserting a direct conflict among the circuits (Pet., p. 8), and (C) by adding to the questions as to which certiorari is sought an issue not even discussed below—the issue settled in the 1962 case of *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, cert. denied 372 U.S. 944. None of these three lends much future significance to a decision on a state of facts not likely to recur.

A. This case could control the disposition of two or three million dollars worth of claims only (1) if that many "cumulation" claims still existed and (2) if the decision here were determinative in all other cases. As to (1), counsel for petitioner have kindly supplied us with a list of claims going to make up the figure cited on page 11 of the Petition. Upon checking each case with counsel for claimants, our calculation is that the maximum amount which could be affected is about $700,000. (See Appendix, p. 15). This is a respectable sum, but not so impressive as to command this

Court's instant attention. More significant, however, is the absence of logical basis for claim (2)—for it is not at all clear why this case necessarily disposes of *any* other case, much less of all pending "cumulation" cases. Unless the course of accounting and correspondence between other parties and the Maritime Commission were identical to Black Diamond's, there is nothing in this case to prevent the Government from successfully asserting a time-bar in any other case. The Court below was at pains to point out that its ruling was based on its view of the contract *plus* "the factual premises just recounted showing that no final audit was attempted or practicable before 1955". (Pet. App. p. 9a).

B. The claim of a direct conflict in the circuits requires a brief review of the "charter hire" litigation now drawing to a close.

Black Diamond's case is one of the last of the group of "charter hire" cases involving charters of the war-built fleet. Three major issues were involved in this group of cases: (1) was the Government correct in collecting up to 90% of profits by requiring a "sliding scale" provision in charters; (2) could the Government split the charter into two accounting periods; and (3) when Congress called for sharing of "cumulative" profits did it mean the Government shared in profits during profit years but not losses in loss years? All three questions have now been answered. This Court decided the first two in the affirmative in *Massachusetts Trustees* v. *United States*, 377 U.S. 235. The third question was decided in 1962 in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4 Cir.); certiorari was immediately sought and denied: 372 U.S. 944. The *Moore-McCormack* construction of "cumulative" to mean cumulative for the period of a charter is now the established law, followed in this case and in the

ninth circuit: *American President Lines* v. *United States*, 338 F. 2d 962.

Prior to the cases settling the merits of the three charter hire issues, the Government attempted to obtain decisions holding various suits time-barred. The undesirable results of this course are exemplified in the Second Circuit litigation which culminated with *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, cert. denied 368 U.S. 895.[3] This decision is made up of three opinions by five judges, all dealing with the time-bar defense to both "sliding scale" and "cumulation" claims, but presumably without regard to the merits of any claim. Two judges (Circuit Judges Friendly and Moore) would not have held either sliding scale or cumulation claims time-barred. Two judges in the majority (Circuit Judges Clark and Waterman) would have held all claims time-barred. The crucial point here, though, is that Judges Clark and Waterman would have found the cumulation claims time-barred only because they believed "additional hire depends on the amount of cumulative profits *for*

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[3] The District Court in *American Eastern Corporation* v. *United States*, 133 F.Supp. 11 (D.C.N.Y., 1955) held that the statute of limitations begins to run on a cumulation claim when the charterer "return[s] the last of its ships to [the Government]" (133 F. Supp. at 14). There was no discussion in that case of the merits of the cumulation claim, and in any event (as the court below noted (Pet., p. 4a)) all accountings had been submitted more than two years before that libel was filed. *American Eastern* was affirmed *per curiam* (231 F.2d 664 (C.A. 2, 1956)) with a citation to *Sword Line* v. *United States*, 228 F.2d 344 (C.A. 2, 1955), a case which also held, but with reference to a sliding scale claim, that the statute of limitations begins to run when the charterer returns its last ship to the Government. Neither the *American Eastern* holding nor the *Sword Line* holding survives *American Foreign*, which distinguished "sliding scale" from "cumulation" claims with respect to the running of the statute of limitations (291 F.2d at 603) and picked, for both types of claims, times other than the return of the last ship to the government.

the year" (291 F. 2d at 611, emphasis in original). In other words, these two judges were reasoning as if the "cumulative" accounting required were cumulative only for a year, not the period of the contract—which is wrong, as *Moore-McCormack* teaches.

Thus, as long as *Moore-McCormack* is good law, there is nothing in the decision of four out of the five judges in *American-Foreign* which conflicts with the decision here. Judges Moore and Friendly would not have held the claims time-barred, Judges Clark and Waterman were proceeding on a different view of the merits of a cumulation claim. Only in the remarks of Circuit Judge Smith is there the language which Petitioner quotes to show a conflict. Judge Smith's view (291 F. 2d at 607-8) is that disputes can be postponed by contract until audit (as here) but, for unexplained reasons, that the statute of limitations runs from time of preliminary statement. This reads out of the contract, for reasons which are neither stated nor apparent, the Government's promise to return money due at time of final audit.

The Court below here was of course aware of *American-Foreign,* but said (Pet. App. 13a):

> "The distinguishing holding there was that liability for additional hire was to be determined on a yearly rather than a charter-term basis."

The Court below viewed the definition of "final audit" in this case as required by the *Moore-McCormack* precedent. Given *Moore-McCormack's* view of "cumulative accounting," *American-Foreign* is not in conflict with this case, at least as to four out of five judges. What the fifth judge (Judge Smith) would have held if he were following the *Moore-McCormack* view of the nature of the claim is difficult to say. In any event,

the "conflict" in the old limitations case of *American-Foreign* is neither important nor of any great present significance now that the nature and merits of the cumulation claim have been settled in *Moore-McCormack*.[4]

C. The petition (p. 16) asks this Court to reconsider its denial of certiorari in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4th Cir., 1962), cert. denied 372 U.S. 944. The *Moore-McCormack* doctrine was not even challenged in the litigation, and was accepted by the Government in the Court below here. Moreover, the Petition admits there is a "continued lack of a conflict in court of appeals' decisions" (Pet. p. 16) as well as this Court's prior denial of certiorari. Nevertheless, in spite of the lack of conflict, the argument is that "it would be appropriate to review the merits of such claims in order finally to settle this ques-

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[4] Even before the *Moore-McCormack* decision, most of the judges in the Second Circuit thought the claims involved in *American-Foreign* were not time-barred. The *American-Foreign* litigation has a tangled history. Originally, Judges Medina, Hincks and Leibell held the claims time-barred on the authority of *Sword Line* v. *United States*, 228 F.2d 344 (C.A. 2, 1955), stating, however, that a different decision might have been made if the subject matter were *res nova*. 265 F.2d 136, 142 (C.A. 2, 1957). The case was then reargued *en banc*, in which Judges Hincks, Medina and Moore held that the time began to run at final audit, and Judges Clark and Waterman dissented (265 F.2d 148). This Court granted certiorari to consider only Judge Medina's eligibility to serve as a member of the *en banc* panel, and held that his retirement rendered him ineligible. 363 U.S. 685. The case was remanded and another *en banc* panel filed the split decision discussed above. Thus:

> "Of the total number of Judges of the Second Circuit who considered the time-bar issue, a majority have felt that Cause 13 is controlling and that the time-bar dismissal should have been reversed. These are Judges Hand, Hincks, Medina, Moore and Friendly." *American Mail Line, Ltd.* v. *United States*, 213 F.Supp. 152, 159-60 (D.C. Wash., 1962).

tion" (Pet., p. 16). Such a pallid argument could be made in support of a petition for certiorari in any case whatsoever.

In fact, it is apparent that review of *Moore-McCormack* is requested because the decision here necessarily follows from (1) *Moore-McCormack's* view of the nature of the claim and (2) the facts of this case. Since the facts of this case are hardly a suitable subject for this Court's review, the only possibility is to attack *Moore-McCormack*. We need not belabor the point that *Moore-McCormack* has become no better subject for review now that it is the settled law, followed without conflict, and now that the last charter hire cases are drawing to a close.

2. The Petition asserts that both the decision below and the decision in *Moore-McCormack* are wrong. They are not only right, but also good policy.

A. *As to Black Diamond.* The decision of the Court below is its own best defense. The opinion rests on a careful consideration of the facts, followed by (1) a holding that "no final audit was attempted or practicable until 1955" (Pet. App. p. 9a) and (2) an interpretation of Clause 13 of the charter as postponing multiple suits until final audit.

The interpretation of Clause 13 is right as a matter of the charter's language, right in view of the conduct of the parties (including the Government), and right as a matter of policy. The charter language promised refunds of overpayment after final audit. There is no reason why the Government should be allowed to escape this commitment when, as the Court below held "At no stage did the Commission intimate that the account was closed"

(Pet. App. p. 11a). Further, as a matter of policy, there is no reason why dealings between contractors and the Government should require a continuous spate of premature lawsuits, when the parties have agreed to have one final accounting. We agree that the Government could have made a different contract, calling for continuous lawsuits, but it did not.

B. As to *Moore-McCormack*. The decision in *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (C.A. 4, 1962), cert. denied 372 U.S. 944, contains a painstaking review of the statutory language, the legislative history, and parallel enactments, leading the Court to conclude (308 F. 2d at 870):

> "Use of the word, 'cumulative' indicates an intention that profits and losses shall be cumulated over the life of the charter, just as profits and losses are cumulated over a fixed period of years for purposes of the closely related subsidy recapture."

In other words, Congress intended to take a share of profits over the charter period, not just take a share in good years while not offsetting bad years. The Petition here in two pages (pp. 17-18) offers a rather condensed attack on the *Moore-McCormack* holding. The Petition appears to admit that prior years' losses can offset later years' profits under a "cumulative" accounting, but not that later losses can offset earlier profits. This refined reading of the statute is called its "plain meaning", but represents somewhat of a reversal of the Government position before the Court of Appeals in the *Moore-McCormack* case itself, where the Government had denied that "cumula-

tive" accounting would take account of anything happening in a prior year.[5]

Whatever the Government position, it seems apparent that the plainest and most appropriate meaning of a statute calling for sharing "cumulative net voyage profits" is that there be some "cumulative net" profits during the contract. That is exactly what the *Moore-McCormack* court held.

The Government argues (Pet., pp. 17-18) that the proviso to § 709(a) supports its present interpretation. That proviso states "That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net *profit* in subsequent years." (Italics supplied). Plainly, as the court in *Moore-McCormack* held, the proviso was meant to prohibit carry-overs of profits from one year to the next, which would obligate the charterer to make successive payments on the same profit.[6]

Finally, the Government says (Pet., p. 18) that its interpretation is confirmed by long-standing administrative construction. There are three answers to this, each conclusive. First, the court in *Moore-McCormack* found precisely the opposite: until 1950, Maritime consistently allowed cumulation over the life of the charter.[7] Second, the 1941 General Counsel's opinion

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[5] See Petition for a Writ of Certiorari in No. 862 October Term 1962 (p. 12).

[6] "Its [the proviso's] obvious purpose was to assure that duplicating payments of additional charter hire should not be required on account of the same profit . . . The proviso . . . prohibit[s] only the use of the same reported profit in the calculation of additional charter hire in successive accountings." (308 F.2d at 873).

[7] "Maritime, thus, has consistently and formally interpreted the words 'cumulative net voyage profits' and used in § 709 to require an accumulation of the results of the charter operations over the period of the charter." (308 F.2d at 873).

referred to by the Government (Pet., p. 18) (a) considered *only* whether losses could be carried forward, and agreed that they could; and (b) determined that the proviso to § 709(a) was intended, as the court in *Moore-McCormack* found, to prevent successive payments on the same profits.[8] Third, the 1950 Regulation did not establish any long-standing administrative practices: it was challenged in numerous libels by the charterers[9] and has even been challenged by the Government.[10]

The Government's petition for certiorari in *Moore-McCormack* was denied. The present petition simply repeats a few pages of the earlier one.[11]

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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February 4, 1966

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[8] See Brief for Respondents in Opposition, No. 862, October Term, 1962, p. 10.

[9] See cases cited in *American-Foreign Steamship Corp.* v. *United States*, 265 F.2d 136, 143 (C.A. 2, 1958).

[10] The Government has instituted suits to recover charter hire on the theory that losses cannot be carried forward—the very proposition promulgated by the 1950 regulation. See Brief for Respondents in Opposition, No. 862, October Term, 1962, p. 12.

[11] Compare pages 17-18 of the Petition here with pages 7-9 of the Petition in No. 862, October Term, 1962.

APPENDIX

COMPARISON OF GOVERNMENT AND CLAIMANT ESTIMATES AMOUNTS INVOLVED IN PENDING CHARTER HIRE LITIGATION

	(1) Gov't Estimate Cumulation Claim	(2) Gov't Estimate "No Breakdown"	(3) Claimant Estimate Cumulation Claim	(4) Claimant Estimate Cumulation and Other Claims in Which Time-Bar Issue Involved
1. Amer. Export Lines (S.D.N.Y.) 62 Ad. 611 (S.D.N.Y.) A. 191-09	$ 116,000		$116,000	$ 28,000
2. Lykes Bros. S.S. Co. (E.D. La.) Adm. No. 2817	110,000		110,000	110,000
3. Marine Navigation Co. (D.Del.) Adm. No. 1747		$ 180,000	—0—	—0—
4. Mississippi Shipping Co. (E.D. La.) Adm. No. 2845	115,600		94,900	104,000
5. No. Atl. & Gulf S.S. Co. (S.D.N.Y.) Adm. No. 18437) (S.D.N.Y.) Adm. No. 183-255)	3,000		3,000	—0—
6. Pac.-Atl. S.S. Co. (D.Del.) Adm. No. 1722)			—0—[1]	45,646
(D.Del.) Adm. No. 1737		300,000	44,363[2]	44,363
7. Polaris S.S. Co. (S.D.N.Y.) 65, Ad. 687		113,000	26,000	109,000[3]
8. Pope & Talbot, Inc. (N.D. Cal.) Adm. No. 27161	874,000		10,400[4]	10,400
9. Prudential S.S. Corp. (S.D.N.Y.) Adm. No. 192-293	409,000		102,100[5]	102,100
10. Sea-Land Service, Inc. (D.Del.) Adm. No. 1816	33,220		33,220	33,220

	(1) Gov't Estimate Cumulation Claim	(2) Gov't Estimate "No Breakdown"	(3) Claimant Estimate Cumulation Claim	(4) Claimant Estimate Cumulation and Other Claims in Which Time-Bar Issue Involved
11. So. Atl. S.S. Line (D.Del.) Adm. No. 1735 (D.Del.) Adm. No. 1757		947,000	—0—[6]	—0—
12. States S.S. Co. (N.D. Cal.) Adm. No. 27101	92,000		97,000	97,000
13. Blidberg Rothchild Co. (D.Del.) Adm. No. 1758		11,000	—0—[7]	—0—
14. T.J. Stevenson & Co. (S.D.N.Y.) Adm. No. 198-141 (S.D.N.Y.) Adm. No. 184-383		109,000	5,000	5,000
15. Wessel, Duval & Co. (S.D.N.Y.) 60 Ad. 67		17,000	10,000	10,000
	$1,752,820	$1,677,000	$651,983	$698,729

Total Gov't Estimate (Columns 1 and 2): $3,429,820

[1] This libel involves $45,646 under a domestic trade addendum to the charter contract. There is a cumulation issue as to this addendum but it is a different cumulation question than the one involved in the Black Diamond or American Foreign charters.

[2] The cumulation claim involved in this libel is $44,363. There is also a $214,000 claim based on the theory that losses may be carried *forward* to offset *subsequent* profits—a proposition admitted by the Government here.

[3] This amount includes an $83,000 non-cumulation claim to which a time bar defense has been raised.

[4] The amount originally claimed in this libel is no longer recoverable because of this court's decision in Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235.

[5] There are two separate cumulation claims under two charters, one for $46,900 and a second for $55,200.

[6] This libel was dismissed following this Court's decision in Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235. An amount of $15,000 was refunded to the charterer; this amount was admittedly due but was withheld by the government pending the outcome of this litigation.

[7] No cumulation or time bar issues are involved in this claim.